

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION \_\_\_\_**

**IN THE MATTER OF:**

[Site Name]

[City or Town, County, State]

[Names of Respondents (if many, reference  
attached list)],

Respondents

**ADMINISTRATIVE ORDER ON  
CONSENT FOR REMEDIAL DESIGN**

U.S. EPA Region \_\_\_\_

CERCLA Docket No. \_\_\_\_

Proceeding under Sections 104, 106, 107,  
and 122 of the Comprehensive  
Environmental Response, Compensation,  
and Liability Act of 1980, as amended, 42  
U.S.C. §§ 9604, 9606, 9607, and 9622.

**MODEL ADMINISTRATIVE ORDER ON CONSENT FOR REMEDIAL DESIGN  
(January, 2005)**

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the United States Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

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**[NOTE: Appendices may also be listed in this Table of Contents.]**

## I. JURISDICTION AND GENERAL PROVISIONS

1. The Administrative Order on Consent (“Order”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and [insert name or attach list of Respondents] (collectively “Respondents”). This Order provides that Respondents shall undertake a Remedial Design (“RD”), including various procedures and technical analyses, to produce a detailed set of plans and specifications for implementation of the Remedial Action selected in EPA’s [insert date] Record of Decision for the \_\_\_\_\_ Site (“Site”), [Operable Unit No. \_\_\_,] [as modified by [the] amendment(s) to the Record(s) of Decision [insert date(s) of any amendment(s)], and/or by the Explanation(s) of Significant Differences [insert date(s) of any Explanation(s) of Significant Differences]] (“ROD”). The Site is located at [insert address or descriptive location of Site] in [City or Town, County, State]. In addition, Respondents shall reimburse the United States for certain response costs that it incurs, as provided herein.

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106, 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), as amended, 42 U.S.C. §§ 9604, 9606, 9607, and 9622. This authority was delegated to the EPA Administrator by Executive Order 12580 (52 Fed. Reg. 2923, Jan. 29, 1987) and further delegated to EPA Regional Administrators by EPA Delegation No. 14-14-C. **[NOTE: Under EPA Delegation Number 14-14-C, some Regional Administrators re-delegated this authority. An additional sentence explaining the authority of other regional officials issuing this Order may be necessary. For instance, “This authority was further re-delegated by the Regional Administrator of EPA Region \_\_\_ to the [insert title of manager to whom delegation is made] by [insert the numerical designations and dates of regional delegation].”]**

3. EPA and Respondents recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Order do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of fact, conclusions of law, and determinations in Sections IV and V of this Order. Respondents agree to comply with, and be bound by, the terms of this Order and further agree that they will not contest the basis or validity of this Order or its terms.

4. The objectives of EPA and Respondents in entering into this Order are to protect public health or welfare or the environment at the Site by the design [and implementation] of response actions at the Site by Respondents, to reimburse response costs of EPA, and to resolve the claims of EPA against Respondents as provided in this Order.

5. In accordance with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300, *et seq.*, as amended (“NCP”), and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of \_\_\_\_\_ (the “State”) on \_\_\_\_\_, 20\_\_, of negotiations with potentially responsible parties regarding the implementation of the remedial design for the Site, and EPA has provided the State with an

opportunity to participate in such negotiations and be a party to this Order.

6. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the [insert the relevant federal natural resource trustee(s)] on \_\_\_\_\_, 20\_\_ of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Order.

## **II. PARTIES BOUND**

7. This Order applies to and is binding upon EPA and upon Respondents and their [insert “heirs,” (if applicable)] successors[,] and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent’s responsibilities under this Order. The signatories to this Order certify that they are authorized to execute and legally bind the parties they represent.

8. Respondents are jointly and severally liable for carrying out all activities required by this Order. In the event of the insolvency or other failure of any one or more Respondents to implement the requirements of this Order, the remaining Respondents shall complete all such requirements.

9. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order within [14] days after the Effective Date of this Order or after the date of such retention. Respondents shall be responsible for any noncompliance with this Order.

## **III. DEFINITIONS**

**[NOTE: The following list of definitions may be reduced or expanded as appropriate.]**

10. Unless otherwise expressly provided herein, terms used in this Order that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or its implementing regulations. Whenever terms listed below are used in this Order, in the documents attached to this Order, or incorporated by reference into this Order, the following definitions shall apply:

a. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. “Day” shall mean a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or federal holiday, this period shall run until the close of business of the next working day.

c. “Effective Date” shall be the effective date of this Order as provided in Section

XXX (Effective Date and Subsequent Modification).

d. “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

[e. “\_\_\_\_\_” shall mean the [insert name of state pollution control agency or state environmental protection agency] and any successor departments or agencies of the State].

f. “Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 52 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation) [if Paragraph 88 is included, insert, “, and Paragraph 88 (Work Takeover).”] Future Response Costs shall also include all Interim Response Costs [if Past Response Costs are paid under the Order, insert, “, and all Interest on those Past Response Costs Respondents have agreed to reimburse under this Order that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from [insert date identified in Past Response Costs definition] to the Effective Date.”]

g. “Institutional controls” shall mean non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land and/or resource use. Examples of institutional controls include easements and covenants, zoning restrictions, special building permit requirements, and well-drilling prohibitions.

h. “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with CERCLA § 107(a), 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.<sup>1</sup>

**[NOTE: Include the following definition only if EPA is seeking to recover Past Response Costs under this Order.]**

i. “Interim Response Costs” shall mean all costs, including direct and indirect costs: a) paid by the United States in connection with the Site between [insert date identified in Past Response Costs definition] and the Effective Date; or b) incurred prior to the Effective Date,

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<sup>1</sup> The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at [http://www.epa.gov/budget/finstatement/superfund/int\\_rate.htm](http://www.epa.gov/budget/finstatement/superfund/int_rate.htm).

but paid after that date.

**[NOTE: The following definition should be used, as appropriate, if the Order contains a waiver of contribution rights against certain MSW parties at the Site as provided in Section XXI (Covenant Not To Sue By Respondents).]**

[\_\_\_\_. “Municipal solid waste” shall mean waste material: (i) generated by a household (including a single or multifamily residence); or (ii) generated by a commercial, industrial, or institutional entity, to the extent that the waste material – (I) is essentially the same as waste normally generated by a household; (II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and (III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.]

j. “National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, *et seq.*, including any amendments thereto.

k. “Order” or “Consent Order” shall mean this Administrative Order on Consent and all appendices attached hereto. In the event of conflict between this Order and any appendix, this Order shall control.

l. “Paragraph” shall mean a portion of this Order identified by an Arabic numeral.

m. “Parties” shall mean EPA and Respondents.

**[NOTE: Include the following definition only if EPA is seeking to recover Past Response Costs under this Order.]**

n. “Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at, or in connection with, the Site through [insert date of most recent cost update], plus Interest on all such costs through such date.

o. “Performance Standards” shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action, set forth in Section \_ of the ROD and Section \_ of the SOW.

p. “Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to the [Site or \_\_\_\_ Operable Unit at the Site], and all attachments thereto that the Regional Administrator, EPA Region \_\_, or his/her delegate, signed on \_\_\_\_\_.

q. “Remedial Design” or “RD” shall mean those activities that Respondents shall undertake to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

r. “Remedial Design Work Plan” shall mean the document developed pursuant to Paragraph 32 of this Order and approved by EPA, and any amendments thereto.

s. “Section” shall mean a portion of this Order identified by a Roman numeral and includes one or more paragraphs.

t. “Site” shall mean the \_\_\_\_\_ Superfund Site, encompassing approximately \_\_\_\_ acres, located at [address or description of location] in [name of city], \_\_\_\_\_ County, [name of state], as described in the ROD.

u. “State” [or “Commonwealth”] shall mean the State [or Commonwealth] of \_\_\_\_\_.

v. “Statement of Work” or “SOW” shall mean the statement of work for implementation of the Remedial Design, and any modifications made thereto in accordance with this Order, as set forth in Appendix \_\_\_\_ of this Order. The Statement of Work is incorporated into this Order and is an enforceable part of this Order.

w. “Waste Material” shall mean: 1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3) any “solid waste” under Section 1004(27) of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or “RCRA”), 42 U.S.C. § 6903(27); and 4) any “hazardous material” under [insert appropriate State statutory citation].

x. “Work” shall mean all activities Respondents are required to perform under this Order except those required by Section XIII (Record Retention).

#### IV. FINDINGS OF FACT

**[NOTE: Because Findings of Fact are site-specific, no model language is provided. Facts should be presented concisely, accurately, and logically. Provide enough information in this Section for the Order to stand on its own. The Findings of Fact need to establish and justify the Conclusions of Law that this Order sets forth. Regions should include a discussion of the following points:**

11. Identification of the Site with the name, location, and description (including characteristics of the Site and a description of the surrounding areas, *i.e.*, commercial/industrial/residential area, nearest public supply wells, nearby water bodies, potentially sensitive ecological areas).

12. A brief history of the Site, including Site ownership and operations (process or other activity producing waste, nature of wastes produced).

13. Information that there are hazardous substances at the Site by listing specific chemicals found at the Site and their locations, concentrations, and quantities where known.

14. Description of actual and/or potential release (*i.e.*, leaking drums, contaminated soils, etc.) and contaminant migration pathways, and possible or known routes of exposure, making clear that these are not exclusive.

15. Identification of the populations at risk, both human and non-human.

16. Health/environmental effects of some major contaminants.

17. Whether the Site is on the National Priorities List. Reference CERCLA Section 105 and the *Federal Register* in which notice of listing appeared.

“The \_\_\_\_\_ Site was listed on the National Priorities List (“NPL”) pursuant to CERCLA Section 105, 42 U.S.C. § 9605, on \_\_\_\_\_ (insert month, day, and year).”

18. Identification of Respondents, *i.e.*, name/business; legal status (*i.e.*, corporation, partnership, sole proprietor, trust, individual, federal, state, or local government, etc.), general categories of Respondents’ liability under CERCLA Section 107(a) and connection with the Site, *e.g.*, owner or operator of hazardous waste site, or person who arranged for disposal or treatment of, or transporter of hazardous substances found at the Site.

19. Identification of prior response and enforcement actions, including investigations and assessments, if any, taken at the Site, by EPA or the State.]

## **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

Based on the Findings of Fact set forth above, as well as the Administrative Record supporting this Order, EPA has determined that:

20. The [insert name of site] Site is a “facility” as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

21. The contamination found at the Site, as identified in the Findings of Fact above, includes [a] “hazardous substance(s)” as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

22. Each Respondent is a “person” as defined in Section 101(21) of CERCLA, 42



U.S.C. § 9601(21).

23. Each Respondent is a responsible party as defined in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is subject to this Order under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). Respondents are jointly and severally liable for performance of response action under the Order and for response costs incurred, and to be incurred, at the Site. [Regions should specify each category of liability under CERCLA Section 107. For example:

- a. Respondents [insert names] are the “owner(s)” and/or “operator(s)” of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).
- b. Respondents [insert names] were the “owner(s)” and/or “operator(s)” of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).
- c. Respondents [insert names] arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances at the facility, within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).
- d. Respondents [insert names] accept, or accepted, hazardous substances for transport to the facility, within the meaning of Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4).]

24. The conditions described in [Paragraphs \_\_\_ of] the Findings of Fact above constitute an actual or threatened “release” of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

## **VI. ORDER**

25. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order.

## **VII. DESIGNATED PROJECT MANAGER AND COORDINATORS**

**[NOTE: The Regions may replace references to EPA’s Project Coordinator with Remedial Project Manager (“RPM”), On-Scene Coordinator (“OSC”), or Project Manager.]**

26. Respondents shall retain one or more contractor(s) to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within \_\_\_ days of the

Effective Date. Respondents shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least \_\_\_ days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondents. If EPA disapproves of a selected contractor, Respondents shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within \_\_\_ days of EPA's disapproval. With respect to any contractor proposed to be Supervising Contractor, Respondents shall demonstrate that the proposed contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA will issue a notice of disapproval or an authorization to proceed. Any decision not to require submission of the contractor's QMP should be documented in a memorandum from the OSC and Regional Quality Assurance personnel to the Site file.

27. Within \_\_\_ days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents required by this Order and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on-site or readily available during site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within \_\_\_ days following EPA's disapproval. Receipt by Respondents' Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by all Respondents. [Insert this sentence if Respondents have named their Project Coordinator before the Order is finalized, "Documents to be submitted to the Respondents shall be sent to [insert name, title, organization, and address of Respondents' Project Coordinator.]" ]

28. EPA has designated \_\_\_\_\_ of the [insert Regional Office, *e.g.*, Emergency and Enforcement Response Branch, Region \_\_\_], as its Project Coordinator. Except as otherwise provided in this Order, Respondents shall direct all submissions required by this Order to the Project Coordinator at [insert Project Coordinator's address]. **[NOTE: Regions may specify method of delivery, *e.g.*, by certified mail, express mail, or other delivery method.]**

29. EPA's Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and On-Scene Coordinator ("OSC") by the NCP. In addition, EPA's Project Coordinator shall have the authority, consistent with the NCP, to halt any Work required by this Order and to take any necessary response action when the Project Coordinator determines that conditions at the Site may present an immediate endangerment to public health, welfare, or the environment. The absence of the EPA Project Coordinator from the area under study pursuant to this Order shall not be cause for the stoppage or delay of Work.

30. EPA and Respondents shall have the right, subject to Paragraph 27, to change their respective designated Project Coordinators. Respondents shall notify EPA \_\_\_ days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

## **VIII. WORK TO BE PERFORMED**

31. Respondents shall perform all action necessary to implement the Statement of Work.

**[NOTE: This Section may be modified as appropriate given Site circumstances and regional practices:]**

32. Work Plan and Implementation.

a. Within \_\_\_ days after the Effective Date, Respondents shall submit to EPA and the State a work plan for the design of the Remedial Action at the Site (“Remedial Design Work Plan” or “RD Work Plan”). The RD Work Plan shall provide for design of the remedy set forth in the ROD, in accordance with the SOW and for achievement of the Performance Standards and other requirements set forth in the ROD, this Order, and/or the SOW. Upon its approval by EPA pursuant to Section IX (EPA Approval of Plans and Other Submissions), the Remedial Design Work Plan shall be incorporated into and become enforceable under this Order.

b. The RD Work Plan shall include plans and schedules for implementation of all remedial design and pre-design tasks identified in the SOW, including, but not limited to, plans and schedules for the completion of: [List all items that should be included in the RD Work Plan. This list will be based on site-specific factors and shall include the following items: (1) design sampling and analysis plan (including, but not limited to, a Remedial Design Quality Assurance Project Plan (“RD QAPP”) in accordance with Paragraph 39 (Quality Assurance and Sampling); and (2) a Construction Quality Assurance Plan. The list may also include: (1) a treatability study; (2) a Pre-design Work Plan; (3) a preliminary design submittal; (4) an intermediate design submittal; and (5) a pre-final/final design submittal.] In addition, the RD Work Plan shall include a schedule for completion of the Remedial Action Work Plan.

c. Upon approval of the RD Work Plan by EPA pursuant to Section IX (EPA Approval of Plans and Other Submissions), after a reasonable opportunity for review and comment by the State, and submittal of the Health and Safety Plan for all field activities to EPA and the State, Respondents shall implement the RD Work Plan. Respondents shall submit to EPA and the State all plans, submittals, and other deliverables required under the approved RD Work Plan in accordance with the approved schedule for review. Unless otherwise directed by EPA, Respondents shall not commence further Remedial Design activities at the Site prior to approval of the Remedial Design Work Plan.

d. The preliminary design submittal shall include, at a minimum, the following: (1) design criteria; (2) results of treatability studies; (3) results of additional field sampling and

pre-design work; (4) project delivery strategy; (5) preliminary plans, drawings, and sketches; (6) required specifications in outline form; and (7) a preliminary construction schedule.

e. The intermediate design submittal, if required by EPA or if independently submitted by Respondents, shall be a continuation and expansion of the preliminary design. Any value engineering proposals must be identified and evaluated during this review.

f. The pre-final/final design submittal shall include, at a minimum, the following: (1) final plans and specifications; (2) Operation and Maintenance Plan; (3) Construction Quality Assurance Project Plan ("CQAPP"); (4) Field Sampling Plan (directed at measuring progress towards meeting Performance Standards); and (5) Contingency Plan. The CQAPP, which shall detail the approach to quality assurance during construction activities at the Site, shall specify a quality assurance official ("QA Official"), independent of the Project Coordinator, to conduct a quality assurance program during the construction phase of the project.

33. Health and Safety Plan. Within \_\_\_ days after the Effective Date, Respondents shall prepare and submit to EPA for review and comment a plan that ensures the protection of the public health and safety during performance of on-Site work under this Order. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. **[NOTE: Regions may provide more detail, e.g., SPCC, evacuation plans, etc.]** Respondents shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

34. Respondents shall conduct all work in accordance with the SOW, the ROD(s), CERCLA, the NCP, and all applicable EPA guidance. The Project Coordinator shall use his or her best efforts to inform Respondents if new or revised guidances may apply to the Work.

35. Respondents shall perform the tasks and submit the deliverables that the SOW sets forth. EPA will approve, approve with conditions, modify, or disapprove each deliverable that Respondents submit under this Order and the SOW, pursuant to Section IX (EPA Approval of Plans and Other Submissions). Each deliverable must include all listed items as well as items that the RD Work Plan indicates Respondents shall prepare and submit to EPA for review and approval.

36. Upon EPA's approval, this Order incorporates any reports, plans, specifications, schedules, and attachments that this Order or the SOW requires. With the exception of extensions that EPA allows in writing or certain provisions within Section XVII of this Order (*Force Majeure*), any non-compliance with such EPA-approved reports, plans, specifications, schedules, and attachments shall be considered a violation of this Order and will subject Respondents to stipulated penalties in accordance with Section XVIII of this Order (Stipulated Penalties).

37. If any unanticipated or changed circumstances exist at the Site that may significantly affect the Work or schedule, Respondents shall notify the EPA Project Coordinator by telephone within 24 hours of discovery of such circumstances. Such notification is in addition to any notification required by Section XVII (*Force Majeure*).

38. If EPA determines that additional tasks, including, but not limited to, additional investigatory work or engineering evaluation, are necessary to complete the Work, EPA shall notify Respondents in writing. Respondents shall submit a workplan to EPA for the completion of such additional tasks within 30 days of receipt of such notice, or such longer time as EPA agrees. The workplan shall be completed in accordance with the same standards, specifications, and requirements of other deliverables pursuant to this Order. EPA will review and comment on, as well as approve, approve with conditions, modify, or disapprove the workplan pursuant to Section IX (EPA Approval of Plans and Other Submissions). Upon approval or approval with modifications of the workplan, Respondents shall implement the additional work in accordance with the schedule of the approved workplan. Failure to comply with this Subsection, including, but not limited to, failure to submit a satisfactory workplan, shall subject Respondents to stipulated penalties as set forth in Section XVIII (Stipulated Penalties).

39. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Order shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondents shall ensure that the laboratory used to perform the analysis participates in a QA/QC program that complies with the appropriate EPA guidance. Respondents shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. **[NOTE: Regions should also check with Regional Quality Assurance officers for standard operating procedures for QA/QC and sampling of soil, air, ecology, waste, and water.]** Respondents shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001), or equivalent documentation as determined by EPA.

b. Upon request by EPA, Respondents shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Respondents shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by EPA, Respondents shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondents shall notify EPA not less than \_\_\_ days in advance of any sample collection activity, unless shorter notice is agreed to by

EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondents to take split or duplicate samples of any samples it takes as part of its oversight of Respondents' implementation of the Work.

d. Respondents shall summarize and submit to EPA the results of all sampling and/or tests or other analytical data that they generated, or was/were generated on their behalf, with respect to implementing this Order in the monthly progress reports that the SOW requires. Respondents shall maintain custody of all information and data that the Final Remedial Design Report and any deliverable relied upon or referenced. Upon EPA's request, Respondents shall provide such information and data to EPA.

e. Respondents shall report all communications that it has with local, state, or other federal authorities related to the Remedial Design Work in the monthly progress reports.

f. If, at any time during the Remedial Design process, Respondents become aware of the need for additional data beyond the scope of the approved Work Plans, Respondents shall have an affirmative obligation to submit to EPA's Project Coordinator, within 20 days, a memorandum documenting the need for additional data.

40. Community Relations Plan [**insert the following for Superfund Alternate Sites, "and Technical Assistance Plan"**]. EPA will prepare a community relations plan, in accordance with EPA guidance and the NCP. As requested by EPA, Respondents shall provide information supporting EPA's community relations plan and shall participate in the preparation of such information for dissemination to the public and in public meetings that may be held or sponsored by EPA to explain activities at, or concerning, the Site.

**[NOTE: The sample language below is an additional provision that case teams should consider adding to provide for Technical Assistance funding for community representatives during response actions at Superfund Alternative Sites and other appropriate sites:**

**Within 30 days of a request by EPA, Respondents shall provide EPA with a Technical Assistance Plan ("TAP") for providing and administering up to \$50,000 of Respondents' funds to be used by a qualified community group to hire independent technical advisers during the Work conducted pursuant to this Order. The TAP shall state that Respondents will provide and administer any additional amounts needed if EPA, in its unreviewable discretion, determines that the selected community group has demonstrated such a need prior to EPA's issuance of the ROD contemplated by this Order. Upon its approval by EPA, the TAP shall be incorporated into and become enforceable under this Order.]**

41. Emergency Response and Notification of Releases.

a. In the event of any action or occurrence during performance of the Work,

which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release and shall immediately notify the EPA Project Coordinator, or, in the event of his/her unavailability, the On Scene Coordinator (“OSC”), or the Regional Duty Officer [**insert Regional Office, e.g., Emergency Planning and Response Branch, EPA Region, telephone number, and the EPA Regional Emergency 24-hour telephone number**]. Respondents shall take such actions in consultation with EPA’s Project Coordinator, or other available authorized EPA officer, and in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondents shall reimburse EPA all costs of the response action not inconsistent with the NCP, pursuant to Section XV (Payment of Response Costs).

b. In addition, in the event of any release of a hazardous substance from the Site, Respondents shall immediately notify the National Response Center at (800) 424-8802. Respondents shall submit a written report to EPA within 7 days after each release, setting forth the events that occurred and the measures taken, or to be taken, to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

## **IX. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

42. After review of any plan, report, or other item that is required to be submitted for approval pursuant to this Order, in a notice to Respondents, EPA shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Respondents modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Respondents at least one notice of deficiency and an opportunity to cure within \_\_\_\_ days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects.

43. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Subparagraph 42(a), (b), (c), or (e), Respondents shall proceed to take any action required by the plan, report, or other deliverable, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XVI (Dispute Resolution) with respect to the modifications or conditions made by EPA. Following EPA approval or modification of a submission or portion thereof, Respondents shall not thereafter alter or amend such submission or portion thereof unless directed by EPA. In the event that EPA

modifies the submission to cure the deficiencies pursuant to Subparagraph 42(c) and the submission had a material defect, EPA retains the right to seek stipulated penalties, as provided in Section XVIII (Stipulated Penalties).

44. Resubmission.

a. Upon receipt of a notice of disapproval, Respondents shall, within \_\_\_\_ days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other deliverable for approval. Any stipulated penalties applicable to the submission, as provided in Section XVIII, shall accrue during the \_\_\_\_-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 45 and 46.

b. Notwithstanding the receipt of a notice of disapproval, Respondents shall proceed to take any action required by any non-deficient portion of the submission, unless otherwise directed by EPA. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XVIII (Stipulated Penalties).

c. Respondents shall not proceed further with any subsequent activities or tasks until receiving EPA approval, approval on condition, or modification of the RD Work Plan [**add any additional deliverables, if desired**]. While awaiting EPA approval, approval on condition, or modification of this deliverable, Respondents shall proceed with all other tasks and activities that may be conducted independently of this deliverable, in accordance with the schedule set forth under this Order.

d. For all remaining deliverables not listed above in Subparagraph 44(c), Respondents shall proceed with all subsequent tasks, activities, and deliverables without awaiting EPA approval on the submitted deliverable. EPA reserves the right to stop Respondents from proceeding further, either temporarily or permanently, on any task, activity, or deliverable at any point.

45. If EPA disapproves a resubmitted plan, report, or other deliverable, or portion thereof, EPA may again direct Respondents to correct the deficiencies. EPA shall also retain the right to modify or develop the plan, report, or other deliverable. Respondents shall implement any such plan, report, or deliverable as corrected, modified, or developed by EPA, subject only to Respondents' right to invoke the procedures set forth in Section XVI (Dispute Resolution).

46. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by EPA due to a material defect, Respondents shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately, unless Respondents invoke the dispute resolution procedures in accordance with Section XVI (Dispute Resolution) and EPA's action is revoked or substantially modified pursuant to a Dispute Resolution decision issued by EPA or superseded by an agreement reached pursuant to that Section. The provisions of Section XVI



(Dispute Resolution) and Section XVIII (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is not otherwise revoked, substantially modified, or superseded as a result of a decision or agreement reached pursuant to the Dispute Resolution process set forth in Section XVI, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVIII.

47. In the event that EPA takes over some of the tasks, Respondents shall incorporate and integrate information supplied by EPA into the final reports.

48. All plans, reports, and other deliverables submitted to EPA under this Order shall, upon approval or modification by EPA, be incorporated into and enforceable under this Order. In the event EPA approves or modifies a portion of a plan, report, or other deliverable submitted to EPA under this Order, the approved or modified portion shall be incorporated into and become enforceable under this Order.

## **X. PROGRESS REPORTS**

### **49. Reporting.**

a. Respondents shall submit a written progress report to EPA concerning actions undertaken pursuant to this Order every \_\_\_th day after the date of receipt of EPA's approval of the Work Plan until termination of this Order, unless otherwise directed in writing by the Project Coordinator. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems. **[NOTE: The frequency and content of these reports may be determined on a site-specific basis.]**

b. Respondents shall submit \_\_\_ copies of all plans, reports, or other submissions required by this Order, [the Statement of Work], or any approved work plan. Upon request by EPA, Respondents shall submit such documents in electronic form.

50. **Final Report.** Within \_\_\_ days after completion of all Work required by this Order, Respondents shall submit for EPA review [and approval] a final report summarizing the actions taken to comply with this Order. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports." The final report shall include the following certification signed by a person who supervised or directed the preparation of that report:

To the best of my knowledge, after thorough investigation, I certify that the information contained in, or accompanying, this submission is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the

possibility of fine and imprisonment for knowing violations.

## **XI. SITE ACCESS AND INSTITUTIONAL CONTROLS**

51. If any Respondent owns or controls the Site, or any other property where access is needed to implement this Order, such Respondent shall, commencing on the Effective Date, provide EPA [, “the State,”] and its/their representatives, including contractors, with access at all reasonable times to the Site, or such other property, to conduct any activity related to this Order. Respondents who own or control property at the Site shall, at least 30 days prior to the conveyance of any interest in real property at the Site, give written notice to the transferee that the property is subject to this Order and written notice to EPA [“and the State”] of the proposed conveyance, including the name and address of the transferee. Respondents who own or control property at the Site also agree to require that their successors comply with the immediately preceding sentence, this Section, and Section XII (Access to Information).

52. Where any action under this Order is to be performed in areas owned by, or in possession of, someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within \_\_\_ days after the Effective Date, or as otherwise specified in writing by the Project Coordinator. Respondents shall immediately notify EPA if, after using their best efforts, they are unable to obtain such agreements. For purposes of this Paragraph, “best efforts” includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondents shall reimburse EPA for all costs and attorney’s fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

**[NOTE: If EPA determines that land/water use restrictions are needed on property owned by settling or non-settling landowners, or that a property interest running with the land (granting either a right of access or a right to enforce land/water use restrictions) should be acquired from settling or non-settling landowners, look to the model language included in Section IX of the Revised Model RD/RA Consent Decree (June 15, 2001, or more recent update).]**

53. Notwithstanding any provision of this Order, EPA [“and the State”] retain(s) all of its/their access authorities and rights [if land/water use restrictions are included, insert “, as well as all of its/their rights to require land/water use restrictions”], including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

54. If Respondents cannot obtain access agreements, EPA may obtain access for Respondents, perform those tasks or activities with EPA contractors, or terminate the Order. If EPA performs those tasks or activities with EPA contractors and does not terminate the Order, Respondents shall perform all other activities not requiring access to that site and shall reimburse EPA for all costs incurred in performing such activities. Respondents shall integrate the results

of any such tasks undertaken by EPA into its reports and deliverables.

## **XII. ACCESS TO INFORMATION**

55. Respondents shall provide to EPA [“and the State”], upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA [“and the State”], for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

56. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA [“and the State”] under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when it is submitted to EPA [“and the State”], or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents. Respondents shall segregate and clearly identify all documents or information submitted under this Order for which Respondents assert business confidentiality claims.

57. Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents assert such a privilege in lieu of providing documents, they shall provide EPA [“and the State”] with the following: a) the title of the document, record, or information; b) the date of the document, record, or information; c) the name and title of the author of the document, record, or information; d) the name and title of each addressee and recipient; e) a description of the contents of the document, record, or information; and f) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

58. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at, or around, the Site.

## **XIII. RECORD RETENTION**

59. During the pendency of this Order and until 10 years after the Respondents’ receipt

of EPA's notification that work has been completed, each Respondent shall preserve and retain all non-identical copies of documents, records, and other information (including documents, records, or other information in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 10 years after notification that work has been completed, Respondents shall also instruct their contractors and agents to preserve all documents, records, and other information of whatever kind, nature, or description relating to performance of the Work.

60. At the conclusion of this document retention period, Respondents shall notify EPA ["and the State"] at least 90 days prior to the destruction of any such documents, records, or other information and, upon request by EPA ["or the State"], Respondents shall deliver any such documents, records, or other information to EPA ["or the State"]. Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide EPA with the following: a) the title of the document, record, or other information; b) the date of the document, record, or other information; c) the name and title of the author of the document, record, or other information; d) the name and title of each addressee and recipient; e) a description of the subject of the document, record, or other information; and f) the privilege asserted by Respondents. However, no documents, records, or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

61. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents, or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State or the filing of suit against it regarding the Site, and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

#### **XIV. COMPLIANCE WITH OTHER LAWS**

62. Respondents shall undertake all action that this Order requires in accordance with the requirements of all applicable local, state, and federal laws and regulations, unless an exemption from such requirements is specifically provided by law or in this Order. The activities conducted pursuant to this Order, if approved by EPA, shall be considered consistent with the NCP.

63. Except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and the NCP, no permit shall be required for any portion of the Work conducted entirely on-site. Where any portion of the Work requires a federal or state permit or approval, Respondents shall submit timely applications and take all other actions necessary to obtain and to comply with all such

permits or approvals.

64. This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

## **XV. PAYMENT OF RESPONSE COSTS**

### **[65. Payment for Past Response Costs.**

a. Within 30 days after the Effective Date, Respondents shall pay to EPA \$\_\_\_\_ for Past Response Costs. **[NOTE: The following language should be used if the payment amount is above \$25,000. Regional attorneys should consult with the Comptroller's Office in the Region to determine if more specific EFT instructions should be included.]** Payment shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures that EPA Region \_\_\_\_ will provide Respondents and shall be accompanied by a statement identifying the name and address of the party/parties making payment, the Site name, the EPA Region and Site/Spill ID Number \_\_\_\_, and the EPA docket number for this action. **[NOTE: The following language may be used if the payment amount is below \$25,000.]** Payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." Each check, or a letter accompanying each check, shall identify the name and address of the party/parties making payment, the Site name, the EPA Region and Site/Spill ID Number \_\_\_\_, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address].

b. At the time of payment, Respondents shall send notice that such payment has been made to:

[Insert names and mailing addresses of Regional Attorney or Designated Project Coordinator and contact in Regional Comptroller's Office].

This notice will include copies of the transmittal letter and the check.

c. The total amount that Respondents shall pay pursuant to Subparagraph 65(a) shall be deposited in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.]

### **66. Payment for Future Response Costs:**

a. Respondents shall pay EPA all Future Response Costs not inconsistent with the NCP. On a periodic basis, but at least one year after the Effective Date, EPA will send Respondents a bill requiring payment that includes a [insert name of standard Regionally-

prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors. Also insert the name of the DOJ-prepared cost summary, which would reflect costs incurred by DOJ and its contractors, if any]. Respondents shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 68.

b. Respondents shall make all payments by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party/parties making payment, the Site name, the EPA Region and Site/Spill ID Number \_\_\_\_, and the EPA docket number for this action. Respondents shall send the check(s) to:

EPA Superfund  
[Insert Regional Superfund lockbox number and address].

c. At the time of payment, Respondents shall send notice that such payment has been made to:

[Insert names and mailing addresses of Regional Attorney or Designated Project Coordinator and contact in Regional Comptroller's Office].

This notice will include copies of the transmittal letter and the check.

d. The total amount that Respondents shall pay pursuant to Subparagraph 66(a) shall be deposited in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

67. In the event that [insert if applicable, "the payment for Past Response Costs is not made within 30 days of the Effective Date, or"] the payments for Future Response Costs are not made within 30 days of Respondents' receipt of a bill, Respondents shall pay Interest on the unpaid balance. [Insert if applicable, "The Interest on Past Response Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment."] The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

68. Respondents may contest payment of any Future Response Costs billed under Paragraph 66, if they determine that EPA has made an accounting error, or if they believe EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the EPA Project Coordinator. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondents shall

within the 30-day period pay all uncontested Future Response Costs to EPA in the manner described in Paragraph 66. Simultaneously, Respondents shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of \_\_\_\_\_ and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondents shall send to the EPA Project Coordinator a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondents shall initiate the Dispute Resolution procedures in Section XVI (Dispute Resolution). If EPA prevails in the dispute, within 5 days of the resolution of the dispute, Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph 66. If Respondents prevail concerning any aspect of the contested costs, Respondents shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to EPA in the manner described in Paragraph 66. Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XVI (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondents' obligation to reimburse EPA for its Future Response Costs.

## **XVI. DISPUTE RESOLUTION**

**[NOTE: The Regions should develop a record for the dispute and its resolution.]**

69. Unless this Order expressly provides otherwise, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order. The Parties shall attempt to resolve any disagreements concerning this Order expeditiously and informally.

70. If Respondents object to any EPA action taken pursuant to this Order, including billings for Future Response Costs, they shall notify EPA in writing of their objection(s) within \_\_\_ days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have \_\_\_ days from EPA's receipt of Respondents' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

71. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Order. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the [insert Region-specific] level or higher will issue a written decision on the dispute to Respondents. EPA's decision shall be incorporated into and become an enforceable part of this Order. Respondents' obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the

subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs. Respondents shall proceed in accordance with EPA's final decision regarding the matter in dispute, regardless of whether Respondents agree with the decision.

## **XVII. FORCE MAJEURE**

72. Respondents agree to perform all requirements of this Order within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including, but not limited to, their contractors and subcontractors, that delays or prevents performance of any obligation under this Order despite Respondents' best efforts to fulfill the obligation. The requirement that Respondents exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential *force majeure* event: (a) as it is occurring; and (b) following the potential *force majeure* event, such that the delay is minimized to the greatest extent possible. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

73. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondents shall notify EPA orally within [insert period of time] of when Respondents first knew that the event might cause a delay. Within \_\_ days thereafter, Respondents shall provide to EPA in writing: an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure. Respondents shall be deemed to know of any circumstance of which Respondents, any entity controlled by Respondents, or Respondents' contractors knew or should have known.

74. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.



## **XVIII. STIPULATED PENALTIES**

75. Respondents shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 76 and 77 for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondents shall include completion of the activities under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, [the SOW,] and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by, and approved under, this Order.

### **76. Stipulated Penalty Amounts - Work.**

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph 76(b):

<b><u>Penalty Per Violation (Per Day)</u></b>	<b><u>Period of Noncompliance (Days)</u></b>
\$_____	1-14
\$_____	15-30
\$_____	31-60
\$_____	61 and beyond

### **b. Compliance Milestones**

**[NOTE: List violations or compliance milestones, including due dates for payments.]**

### **77. Stipulated Penalty Amounts - Reports.**

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports [or other written documents] pursuant to Paragraphs \_\_\_\_\_ :

<b><u>Penalty Per Violation (Per Day)</u></b>	<b><u>Period of Noncompliance (Days)</u></b>
\$_____	1-14
\$_____	15-30
\$_____	31-60
\$_____	61 and beyond.

**[NOTE: If desired, Regions may develop separate tables of stipulated penalties for monthly progress reports and any interim deliverable or reports required under the SOW.]**

**[NOTE: Insert the following paragraph if Paragraph 88 (Work Takeover) is included:]**

[78. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 88, Respondents shall be liable for a stipulated penalty in the amount of \_\_\_\_.]

79. All penalties shall begin to accrue on the day after the complete performance is due, or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: a) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and b) with respect to a decision by the EPA Management Official at the [insert Region-specific] level or higher, under Paragraph 71 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

80. Following EPA's determination that Respondents have failed to comply with a requirement of this Order, EPA may give Respondents written notification of the failure and describe the noncompliance. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondents of a violation.

81. Respondents shall pay EPA all penalties accruing under this Section within 30 days of Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to [insert the Regional Lockbox number and address], shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number \_\_\_\_, the EPA Docket Number\_\_\_\_\_, and the name and address of the party/parties making payment. Copies of [the] check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 28, and to [insert the names and mailing addresses of any other receiving officials at EPA].

82. The payment of penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this Order.

83. Penalties shall continue to accrue during any dispute resolution period but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

84. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 81. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order [if Paragraph 88 (Work Takeover) is included, insert, "or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX (Reservation of Rights by EPA), Paragraph 88."]. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

## **XIX. COVENANT NOT TO SUE BY EPA**

**[NOTE: Use Paragraph 85, Alternative 1, if the Order requires payment of Past Response Costs and Future Response Costs.]**

85. **[Alternative 1]** In consideration of the actions that Respondents will perform and the payments that Respondents will make under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work performed under this Order and for recovery of Past Response Costs and Future Response Costs. This covenant not to sue shall take effect upon EPA's receipt of the Past Response Costs due under Section XV (Payment of Response Costs) of this Order and any Interest or Stipulated Penalties due for failure to pay Past Response Costs as required by Sections XV and XVIII (Stipulated Penalties) of this Order. This covenant not to sue is conditioned upon Respondents' complete and satisfactory performance of their obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondents and does not extend to any other person.

**[NOTE: Paragraph 85, Alternative 2, if the Order requires payment of Future Response Costs only.]**

85. **[Alternative 2]** In consideration of the actions that Respondents will perform and the payments that Respondents will make under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work performed under this Order and for recovery of Future Response Costs.

This covenant not to sue shall take effect upon the Effective Date and is conditioned upon Respondents' complete and satisfactory performance of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondents and does not extend to any other person.

## **XX. RESERVATION OF RIGHTS BY EPA**

86. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, except as specifically provided in this Order, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

87. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondents to meet a requirement of this Order;
- b. liability for costs not included within the definition(s) of [Past Response Costs or] Future Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site; and
- g. liability for costs incurred, or to be incurred, by the Agency for Toxic Substances and Disease Registry related to the Site.

[88. Work Takeover. In the event EPA determines that Respondents have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may assume the performance of any or

all portion(s) of the Work as EPA determines necessary. Respondents may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs that the United States incurs in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondents shall pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other provision of this Order, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.]

## **XXI. COVENANT NOT TO SUE BY RESPONDENTS**

89. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, past response actions, [Past Response Costs,] Future Response Costs, or this Order, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at, or in connection with, the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work or payment of [Past Response Costs or] Future Response Costs.

90. **[Insert this phrase if applicable, "Except as expressly provided in Section XXI, Paragraph(s) \_\_\_\_ (Non-Exempt *De Micromis*, *De Minimis*, and MSW Waivers),"** [t]hese covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Subparagraphs 87(b), (c), and (e) - (g), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

91. Respondents reserve, and this Order is without prejudice to, claims against the United States subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim

based on EPA's selection of response actions, or the oversight or approval of Respondents' plans or activities. The foregoing applies only to claims that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

92. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

**[NOTE: Insert the following waiver in Orders that involve Sites that are not listed as final on the National Priorities List, unless a broader waiver of CERCLA claims against all persons is already included in the settlement.]<sup>2</sup>**

[\_\_\_\_. Respondents agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondents with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

[\_\_\_\_. The waiver in Paragraph \_\_\_\_ **[reference preceding paragraph]** shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person meeting the above criteria, if such person asserts a claim or cause of action relating to the Site against such Respondent. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria, if EPA determines:

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.]

**[NOTE: Use as appropriate if a *de minimis* settlement has been concluded at the Site.]**

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<sup>2</sup>This waiver is not necessary at NPL Sites because of the statutory *de micromis* exemption provided in Section 107(o) of CERCLA, 42 U.S.C. § 9607(o).

[\_\_\_\_. Respondents agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person that has entered into a final *de minimis* settlement under Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), with EPA with respect to the Site as of the Effective Date. This waiver shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against such Respondent.]

**[NOTE: Use the following paragraphs if there is MSW at the Site, unless a broader waiver of CERCLA claims against all persons is already included in the settlement.]<sup>3</sup>**

[\_\_\_\_. Respondents agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondents with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of Municipal Solid Waste ("MSW") at the Site, if the volume of MSW disposed, treated, or transported by such person to the Site did not exceed 0.2 percent of the total volume of waste at the Site.

\_\_\_\_. The waiver in Paragraph \_\_\_\_ above shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Respondent. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria, if EPA determines that: (a) the MSW contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; (b) the person has failed to comply with any information request or administrative subpoena issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. § 9604(e) or § 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927; or (c) the person impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site.]

## **XXII. OTHER CLAIMS**

93. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

94. Except as expressly provided in [insert if applicable, "Section XXI, Paragraph(s) \_\_\_\_ (Non-Exempt *De Micromis*, *De Minimis*, and MSW Waivers)"] [and] Section XIX (Covenant

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<sup>3</sup>This waiver is not necessary at NPL Sites for certain MSW generators (residential property owners, small businesses, and non-profit organizations) who meet the criteria for the statutory MSW exemption provided in Section 107(p) of CERCLA, 42 U.S.C. § 9607(p).

Not to Sue by EPA), nothing in this Order constitutes a satisfaction of, or release from, any claim or cause of action against Respondents or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or common law, including, but not limited to, any claims of the United States for costs, damages, and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

95. No action or decision by EPA pursuant to this Order shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

### **XXIII. CONTRIBUTION PROTECTION**

96. The Parties agree that Respondents are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Order. The “matters addressed” in this Order are the Work [ , Past Response Costs,] and Future Response Costs. [Insert if applicable, “Except as provided in Section XXI, Paragraph(s) \_\_\_\_, of this Order (Non-Exempt *De Micromis*, *De Minimis*, and MSW Waivers),”] [N]othing in this Order precludes the United States or Respondents from asserting any claims, causes of action, or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

### **XXIV. INDEMNIFICATION**

97. Respondents shall indemnify, save, and hold harmless the United States, its officials, agents, contractors, subcontractors, employees, and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondents agree to pay the United States all costs incurred by the United States, including, but not limited to, attorneys fees and other expenses of litigation and settlement, arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party to any contract entered into, by, or on behalf of Respondents in carrying out activities pursuant to this Order. Neither Respondents nor any such contractor shall be considered an agent of the United States.

98. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.

99. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made, or to be made, to the United States, arising from, or on account of, any contract, agreement, or arrangement between any one or more of



Respondents and any person for performance of Work on, or relating to, the Site, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from, or on account of, any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on, or relating to, the Site.

## **XXV. INSURANCE**

100. At least \_\_\_\_ days prior to commencing any on-Site Work under this Order, Respondents shall secure and shall maintain for the duration of this Order comprehensive general liability insurance and automobile insurance with limits of \_\_\_\_\_ million dollars, combined single limit, naming the EPA as an additional insured. Within the same period, Respondents shall provide EPA with certificates of such insurance and a copy of each insurance policy. Respondents shall submit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Order, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Order. If Respondents demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondents need provide only that portion of the insurance described above that is not maintained by such contractor or subcontractor.

## **[XXVI. FINANCIAL ASSURANCE]**

[101. Within 30 days of the Effective Date, Respondents shall establish and maintain financial security for the benefit of EPA in the amount of \$ **[insert estimated cost of Work]** in one or more of the following forms, to secure the full and final completion of Work by Respondents:

- a. a surety bond unconditionally guaranteeing payment and/or performance of the Work;
- b. one or more irrevocable letters of credit, payable to or at the direction of EPA, issued by financial institution(s) acceptable in all respects to EPA equaling the total estimated cost of the Work;
- c. a trust fund administered by a trustee acceptable in all respects to EPA;
- d. a policy of insurance issued by an insurance carrier acceptable in all respects to EPA, which ensures the payment and/or performance of the Work;
- e. a corporate guarantee to perform the Work provided by one or more parent

corporations or subsidiaries of Respondents, or by one or more unrelated corporations that have a substantial business relationship with at least one of Respondents; including a demonstration that any such company satisfies the financial test requirements of 40 C.F.R. Part 264.143(f); and/or

f. a corporate guarantee to perform the Work by one or more of Respondents, including a demonstration that any such Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f).

**[NOTE: If any Respondents who seek to provide a demonstration under 40 C.F.R. § 264.143(f) have provided a similar demonstration at other RCRA or CERCLA Sites, the amount for which they are providing financial assurance at those Sites should generally be added to the estimated costs of the Work for this Paragraph. Regions should add a provision to the Order requiring Respondents to provide documentation of the prior demonstration.]**

102. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondents shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 101, above. In addition, if at any time EPA notifies Respondents that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondents shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondents' inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Order.

103. If Respondents seek to ensure completion of the Work through a guarantee pursuant to Subparagraph 101(e) or 101(f) of this Order, Respondents shall: (i) demonstrate to EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date, to EPA. For the purposes of this Order, wherever 40 C.F.R. Part 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the current cost estimate of \$\_\_\_ for the Work at the Site shall be used in relevant financial test calculations.

104. If, after the Effective Date, Respondents can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 101 of this Section, Respondents may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondents shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and

may reduce the amount of the security after receiving written approval from EPA. In the event of a dispute, Respondents may change the form of financial assurance required hereunder only in accordance with a final decision resolving such dispute pursuant to Section XVI (Dispute Resolution).

105. Respondents may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by EPA, provided that EPA determines that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondents may change the form of financial assurance required hereunder only in accordance with a final decision resolving such dispute pursuant to Section XVI (Dispute Resolution).]

## **XXVII. INTEGRATION/APPENDICES**

106. This Order **[insert if applicable, “, its appendices,”]** and any deliverables, technical memoranda, specifications, schedules, documents, plans, reports (other than progress reports), etc. that will be developed pursuant to this Order and become incorporated into, and enforceable under, this Order constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Order.

107. In the event of a conflict between any provision of this Order and the provisions of any document attached to this Order or submitted or approved pursuant to this Order, the provisions of this Order shall control.

108. The following documents are attached to and incorporated into this Order:

[List the Attachments to the Order, *i.e.*:

“Appendix A” is the SOW.

“Appendix B” is the ROD.

“Appendix C is the map of the Site **[insert name of OU if appropriate]**. **[NOTE: This provision is optional if the Region does not provide a Site map.]**

“Appendix D” is the **[insert name of any additional appendices attached to this Order]**.

## **[XXVIII. PUBLIC COMMENT]**

**[NOTE: Include this Section if any response costs are compromised under Section XV of this Order.]**

[\_\_\_\_. Final acceptance by EPA of Section XV (Payment of Response Costs) of this Order shall be subject to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i), which requires EPA to publish notice in the *Federal Register*, to provide persons who are not parties to the proposed settlement an opportunity to comment solely on the cost recovery component of the settlement, and to consider comments filed in determining whether to consent to the proposed settlement. EPA may withhold consent from, or seek to modify, all, or part, of Section XV of this Order if comments received disclose facts or considerations that indicate that Section XV of this Order is inappropriate, improper, or inadequate. Otherwise, Section XV shall become effective when EPA issues notice to Respondents that public comments received, if any, do not require EPA to modify or withdraw from Section XV of this Order.]

#### **[XXIX. ATTORNEY GENERAL APPROVAL]**

**[NOTE: This Section should be used if Attorney General approval is required for Section XV of this Order, because total past and projected response costs of the United States at the Site will exceed \$500,000, excluding interest, and the Order compromises a claim for past or future costs. If Attorney General approval is required, the Region should consult with DOJ during the negotiations process and obtain written DOJ approval before publishing notice of the proposed cost compromise in the *Federal Register*. If the Order compromises a claim, but Attorney General approval is not required, because the total past and projected response costs of the United States at, or in connection with, the Site are not expected to exceed \$500,000, excluding interest, insert a finding of fact stating that “The Regional Administrator of EPA Region \_\_\_\_, or [his/her] designee, has determined that the total past and projected response costs of the United States at or in connection with the Site will not exceed \$500,000, excluding interest.”]**

[\_\_\_\_. [The Attorney General or [his/her] designee has approved the response cost settlement embodied in this Order in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).]

#### **XXX. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION**

109. **[NOTE: Regions may insert specific practice and language.]** This Order shall be effective \_\_\_\_ days after the Order is signed by the Regional Administrator or his/her designee **[if the Order includes a cost recovery compromise, include the following, “, with the exception of Paragraph \_\_\_\_ of Section XV, which shall be effective when EPA issues notice to Respondents that public comments received, if any, do not require EPA to modify or withdraw from Paragraph \_\_\_\_ of Section XV of this Order.”]**

110. This Order may be amended by mutual agreement of EPA and Respondents. Amendments shall be in writing and shall be effective when signed by EPA. EPA Project Coordinators do not have the authority to sign amendments to the Order.

111. No informal advice, guidance, suggestion, or comment by the EPA Project

Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

### **XXXI. NOTICE OF COMPLETION OF WORK**

112. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with the other requirements of this Order, with the exception of any continuing obligations required by this Order, including [insert list of such obligations, *e.g.*, payment of Future Response Costs or record retention], EPA will provide written notice to Respondents. If EPA determines that any such Work has not been completed in accordance with this Order, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the Work Plan if appropriate to correct such deficiencies. Respondents shall implement the modified and approved Work Plan and shall submit the required deliverables. Failure by Respondents to implement the approved modified Work Plan shall be a violation of this Order.

Agreed this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

For Respondent \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

**[NOTE: Use a separate page for the following signature.]**

It is so ORDERED AND AGREED this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

BY: \_\_\_\_\_

DATE: \_\_\_\_\_

Name

Regional Administrator [or Delegatee]

Region \_\_\_\_\_

United States Environmental Protection Agency

EFFECTIVE DATE: \_\_\_\_\_